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COLOR OF TITLE.

I. *Definition and Nature of Color of Title.*—Color of title to land is that which, in appearance, has all the requisites and characteristics of title, but which, in reality, by reason of some defect, fails to convey the lawful title: *Wright* v. *Mattison*, 18 How. 56; *Hall* v. *Law*, 102 U. S. 466; *Walls* v. *Smith*, 19 Ga. 8; *Veal* v. *Robinson*, 70 Id. 809. In *Brooks* v. *Bruyn*, 35 Ill. 392, the court say: "Any instrument having a grantor and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described. Such an instrument purports to be a conveyance of the title, but because it does not, for some reason, have that effect, it passes only color or the semblance of a title. It makes no difference whether the instrument fails to pass an absolute title because the grantor had none to convey, or had no authority in law or in fact to convey one, or whether such want of authority appears on the face of the instrument or *aliunde*. The instrument fails to pass an absolute title for the reason that the grantor was not possessed of some one or more of these requisites, and therefore it gives the semblance or color only of what its effect would be if they were not wanting."

There is an important distinction between *claim* of title and *color* of title. The possession of one who has a colorable title is coextensive with the boundaries of the instrument under which he claims, in the absence of any actual possession by the true owner; whereas the possession of one entering and holding under a mere

claim of title is confined to the land in his actual occupation: *Creekmur* v. *Creekmur*, 75 Va. 430. In other words, if one claims title but has no color to sustain his claim, his possession reaches no further than there is a *pedis possessio;* but if he has a colorable title, his actual occupancy of a part is constructively extended to embrace the whole of the tract described in the instrument giving color: 3 Washb. Real Prop. (4th ed.) 137. The chief office, then, of color of title is to give constructive possession. And, as we shall see hereafter, it always includes claim of title; though the converse of this proposition would not be true.

Now a claim, founded on color of title may, by force of the statute of limitations, ripen into a complete title, which will enable him in whom it is vested, if plaintiff, to maintain an action of ejectment, or if defendant, to defeat it. The importance of the subject lies in the fact that adverse possession, to mature into an actual title, must have commenced under color or claim of title.

It should also be premised that the courts have generally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry has always been, whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith: *Wright* v. *Mattison*, 18 How. 56.

II. *Written Instrument not Essential.*—It may appear somewhat paradoxical to assert that a written instrument is not essential to color of title, but an examination of the authorities will show this to be the case. As above stated, the chief office of color of title is to extend the possession, constructively, beyond the actual occupation to the full limits of the claim. And it is evident that this result may well be accomplished without the aid of papers. Hence, notwithstanding some difference of opinion, it may be stated as a fair conclusion from the decisions that color of title may exist without any instrument purporting to convey title, provided always that there is a *bona fide* claim of title and some record or some public and notorious act, such as a survey, whereby the precise extent of the claim is defined and with reference to which it is made. Thus, in the case of *McClellan* v. *Kellogg*, 17 Ill. 501, SCATES, C. J., observes: "Color may be given for title without a deed or writing at all, and commence in trespass; and when founded upon a writing, it is not essential that it should show upon its face a *prima facie*

title, but that it may be good as a foundation for color, however defective." See also *La Frambois* v. *Jackson*, 8 Cow. 589; *Jackson* v. *Camp*, 1 Id. 605; *Smith* v. *Burtis*, 9 Johns. 180; *Jackson* v. *Wheat*, 18 Id. 40; *Malson* v. *Fry*, 1 Watts 433; *Bell* v. *Hartly*, 4 W. & S. 32; *Frederick* v. *Searle*, 5 S. & R. 236; *Hawk* v. *Senseman*, 6 Id. 21; *Miller* v. *Shaw*, 7 Id. 129; *Boyer* v. *Benlow*, 10 Id. 303; *Dufour* v. *Camfranc*, 11 Mart. 715; *Whiteside* v. *Singleton*, Meigs 207. "When a party is in possession pursuant to a state of facts which in themselves show the character and extent of his entry and claim, the case is entirely different, and such facts, whatever they may be in a given case, perform sufficiently the office of color of title. They evidence the character of the entry and the extent of the claim, and no colorable title does more." *Bell* v. *Longsworth*, 6 Ind. 273. And see *Van Cleave* v. *Milliken*, 13 Id. 105; *Sumner* v. *Stevens*, 6 Met. 337; *Ashley* v. *Ashley*, 4 Gray 197; *St. Louis* v. *Gorman*, 29 Mo. 593; *McCall* v. *Neeley*, 3 Watts 69; *Rannels* v. *Rannels*, 52 Mo. 112. But still it is very necessary that there should be some visible acts, signs or indications, which are apparent to all, showing the extent of the boundaries of the land claimed, to amount to color of title. *Cooper* v. *Ord*, 60 Mo. 431.

Color of title, however, in the large majority of cases where it has been defined by the courts, or where its requisites and characteristics have been called in question, has been based on some written instrument. In our further discussion, therefore, it will be understood that color of title resting in documents is meant, unless otherwise specified.

III. *Instrument must purport to convey Title.*—It is clear that a written instrument cannot constitute color of title unless it purports or professes to convey the title. According to the definition, it must carry on its face the semblance or appearance of a transfer of the legal title. Hence a mere executory contract or bond to convey will not ordinarily give color of title. Such an instrument does not profess to convey; it only promises to convey. *Dunlap* v. *Daugherty*, 20 Ill. 404; *Rigor* v. *Frye*, 62 Id. 507; *Kilburn* v. *Ritchie*, 2 Cal. 145; *Osterman* v. *Baldwin*, 6 Wall. 116; *King* v. *Travis*, 4 Heyw. 280. So a title bond from A. to B., taken by B. for the benefit of C., but never assigned to him, is not a sufficient color of title in C. to enable him, claiming thereunder, to perfect a title by the Statute of Limitations. *Green* v. *Kersey*, 32 Ga. 152.

It is upon this principle also that we must understand the decisions to the effect that a certificate of purchase of real estate at its sale for non-payment of taxes, cannot give color of title. *Bride* v. *Watt*, 23 Ill. 507; *McKeighan* v. *Hopkins*, 14 Neb. 361. Irrespective of the question whether the tax sale was authorized by law, and whether all the statutory requirements have been complied with or not, the tax certificate does not convey the title, nor even purport to do so. It merely establishes a peculiar species of equity or lien in favor of the purchaser. It assures him that if certain steps shall not have been taken by the owner before a designated future time, he will then be entitled to apply for and to obtain a deed, which last named instrument *will* convey to him the title. Evidently, therefore, if the purchaser omits to take out his tax deed, the certificate cannot avail him as color of title.

This rule—that the instrument must profess to convey *in presenti* —does not mean that the title must purport, when traced back to its source, to be an apparently legal title, but only that the particular document relied on must profess to convey a title to the grantee: *Coleman* v. *Billings*, 89 Ill. 183.

IV. *Possession limited by Description in Deed.*—Color of title, as above stated, extends the possession, by construction, to the full limits of the estate. But a deed or other written instrument cannot give color of title to anything lying beyond the limits of the tract which, by the description, it purports to convey: *Woods* v. *Banks*, 14 N. H. 101; *McRae* v. *Williams*, 7 Jones (N. C.) 430; *Hinchman* v. *Whetstone*, 23 Ill. 185. Thus, where a deed purported to convey two lots by their numbers, the plat and stakes showing the precise location, but the description including six feet on another lot, it was held to give color of title to the entire lots as shown by the plat and stakes, which prevail over distances: *Bolden* v. *Sherman*, 110 Ill. 418.

V. *Examples of Instruments giving Color of Title.*—Among the most usual examples of written instruments which have been held to give a colorable title, we may mention decrees of a court which ought to have been followed by private conveyances, but were not, and private conveyances, regular in themselves, executed in pursuance of voidable or void decrees. These answer exactly to the definition and requirements of color of title, and possession held under them will ripen into a perfect title if the running of the

statute be not interrupted. For instance, where a decree directing partition of land held in common was rendered, and a division was made setting apart to each tenant in common his portion in severalty, which division was reported to the court and approved, but deeds were not interchangeably made so as to complete the partition and vest the legal title in the portions assigned to each in severalty, and afterwards one of the tenants remained in possession and paid taxes on the portion allotted to him, it was held that he was in under color of title: *Chickering* v. *Faile*, 38 Ill. 342. So, the possession of lands under a guardian's conveyance, made pursuant to a void decree of the probate court for their sale, is supported by color of title and is adverse: *Molton* v. *Henderson*, 62 Ala. 426. See *Whiteside* v. *Singleton*, 1 Meigs 207. A *will* also constitutes color of title, and if accompanied with possession for the necessary length of time will mature into a complete title: *Trustees* v. *Blount*, 2 Tayl. 13. A grant from the state, purporting to be made in obedience to acts of the General Assembly providing for the relief of persons whose title-deeds had been destroyed by the burning of the court house of a particular county, will furnish color of title: *Kron* v. *Hinson*, 8 Jones (N. C.) 347. Compare *Oliver* v. *Pullam*, 24 Fed. Repr. 127. But the greatest number of decisions under the general topic have been concerned with the effect of *deeds*, private or official, and we now pass to the consideration of these cases.

VI. *Deeds Private and Official.*—And, first, an unregistered deed is sufficient to constitute color of title: *Lea* v. *Copper Co.*, 21 How. 493; *Minot* v. *Brooks*, 16 N. H. 374; *Hardin* v. *Barrett*, 6 Jones (N. C.)159. But in Georgia it is held that this will not be the case unless proof of the execution of the deed is adduced: *Hightower* v. *Williams*, 38 Ga. 597. Again, a deed purporting to be executed by virtue of a power of attorney from the owner of the land, which power is not proved, affords sufficient color of title on which to found an adverse possession, if there has been a good constructive occupation under it: *Munro* v. *Merchant*, 28 N. Y. 9; *In re Brackett, Petitioner*, 53 Me. 228; *Hill* v. *Wilton*, 2 Murph. 14. So a forged deed is good to give color of title under the statute to a *bona fide* holder: *Griffin* v. *Stamper*, 17 Ga. 108. And the defect in a deed of real estate which has but one subscribing witness is cured by an adverse pos-

session under it during the requisite length of time: *Lyles* v. *Kirkpatrick*, 9 S. C. 265. A deed of mortgaged premises, absolute on its face, and purporting to convey the title to the land described in it, executed by a mortgagor to the mortgagee, for a sufficient consideration, is color of title: *McCagg* v. *Heacock*, 42 Ill. 153. Again, a deed which is fraudulent as to the grantor's creditors is voidable only, and therefore gives the grantee color of title: *Harper* v. *Tapley*, 35 Miss. 506. So, where a grantor takes a deed accidentally executed to him by a wrong name, and enters into possession under it, it will constitute color of title: *Elston* v. *Kennicott*, 46 Ill. 187. If real estate is held in common, and one tenant assumes to convey the entire land, or any specific part of it by metes and bounds, his deed will furnish color of title, and possession held under it during the prescribed term will be adverse to the title of the co-tenants, and will bar their right to recover the land conveyed: *Weisinger* v. *Murphy*, 2 Head 674. Compare *Saunders* v. *Silvey*, 55 Tex. 46. On similar principles, a married woman's deed, defective for want of privy examination, is an assurance of title sufficient to protect an adverse holder: *Hanks* v. *Folsom*, 11 Lea 555; *Fry* v. *Baker*, 59 Tex. 404; *Watson* v. *Mancill*, 76 Ala. 600. But there must be a party grantor, as well as a grantee, to furnish color of title. Hence, a colorable title cannot be obtained by a deed from commissioners of highways who cannot, in any case, be grantors: *Pittsburgh, etc.*, *Rd.* v. *Reich*, 101 Ill. 157.

A deed made by a master in chancery, or clerk, after he goes out of office, on a sale made by him while in office, is good as color of title though not otherwise operative: *Williams* v. *Council*, 4 Jones (N. C.) 206. So a sheriff's deed, without producing the judgment and execution under which the land was sold, is sufficient to show the character of the grantee who claims under it, and renders his possession adverse: *Riggs* v. *Dooley*, 7 B. Mon. 236; *Sutton* v. *McLoud*, 26 Ga. 638. And it is also held that a sheriff's deed will give color of title though founded on a void or voidable judgment. "As a foundation of title," say the court, "it is worthless, by reason of the void judgment in which it had its inception. We are not, however, considering it as a medium for the conveyance of title. An adverse claimant of land is a wrongdoer, and as such is treated and known to the law, until, by the lapse of years, his acts, before tortious, are consecrated by time and

dignified as lawful:" *Packard* v. *Moss*, (Sup. Ct. Cal. 1885), 21 Reporter 552. An administrator's deed, void as against heirs for want of notice, they being minors, will give color of title, under which, if the premises be held adversely during the statutory period after the heirs attain their majority, their right of action will be barred: *Vancleave* v. *Milliken*, 13 Ind. 105; *Root* v. *McFerrin*, 37 Miss. 17.

VII. *Tax Deeds.*—In regard to tax deeds, as furnishing color of title, the law is somewhat peculiar. It should be remembered, in the first place, that the power to sell land for the non payment of taxes is a *naked* power, not coupled with an interest; that every step in the proceedings must be taken with strict regard to an exact compliance with the statutory requirements, or else the sale will be invalid; that the burden is on the tax purchaser to prove such compliance; and that, unless made so by express statute, a tax deed is not evidence of any fact whatever, except, perhaps, its own existence. Now if there be no statute to make a tax deed *prima facie* evidence, it may well be doubted whether it would, of itself, amount to color of title. For the party relying upon a tax sale would be called upon (in ejectment for example,) to prove the preliminary steps, such as the assessment and levy of taxes, the return of the land as delinquent, the notice of its sale, the actual sale, and so on, and in the apparent regularity of *these* proceedings would be found his color of title, rather than in the deed which could not be brought into evidence until they had been *prima facie* established. But if the statute makes the tax deed original evidence of title, or of the regularity of the anterior proceedings, the case is otherwise. Under such circumstances it is well settled that, although the tax sale be irregular or invalid, yet the collector's deed, in connection with proof of the actual possession of the land by the purchaser and those claiming under him, during the whole period of limitation, is a sufficient foundation for a complete prescriptive title: *Elliott* v. *Pearce*, 20 Ark. 508; *Cofer* v. *Brooks*, Id. 542; *Finlay* v. *Cook*, 54 Barb. 9; *Dillingham* v. *Brown*, 38 Ala. 311; *Holloway* v. *Clark*, 27 Ill. 483; *Hardin* v. *Crate*, 78 Id. 533. Thus, possession of land in good faith may well be under a sufficient color of title, though it be founded on a tax sale not preceded by any advertisement thereof: *Doe* v. *Hearick*, 14 Ind. 242. Or although the description of the property in the deed is defective: *Childs* v. *Shower*, 18 Iowa 261. Or although the judgment on which the

sale was based was fatally defective: *Baily* v. *Doolittle*, 24 Ill. 577. But a mere *sale* of land by a tax collector, without any deed, it is said, will give the purchaser no color of title: *Annan* v. *Baker*, 49 N. H. 161. And a deed of land sold for taxes, made neither to the purchaser nor the assignee of the certificate of purchase, to whom alone it is authorized to be made, will not lay the foundation for a colorable title: *Childress* v. *Calloway*, 76 Ala. 128. And it is to be noted that the claimant of land under a tax deed has color of title only from the date of the deed and not from the day of the sale: *DeGraw* v. *Taylor*, 37 Mo. 310.

VIII. *Tax Deed Void on its Face.*—We have taken it for granted, in the preceding section, that the tax deed alleged as constituting color of title, was regular on its face and apparently legal and valid. But where the deed shows upon its face that it is void and worthless, a question of greater difficulty arises. It is the settled doctrine of several of the states, that a tax deed void on its face can by no means serve as color of title: *Shoat* v. *Walker*, 6 Kans. 65; *Sapp* v. *Morrill*, 8 Id. 677; *Wofford* v. *McKinna*, 23 Tex. 36; *Cain* v. *Hunt*, 41 Ind. 466; *Arrowsmith* v. *Burlingim*, 4 McLean 489; *Keefe* v. *Bramhall*, 3 Mackey 551. These decisions proceed, for the most part, upon the ground that if the instrument discloses its own invalidity, there can be no good faith on the part of the claimant; he must be aware of the nullity of his own claim, and hence his possession cannot be considered hostile in such sense that it may ripen into an indefeasible title. On the other hand, it is the accepted view in Wisconsin, that when the protection of the special statute of limitations is invoked, it is immaterial whether the tax deed be valid or void, or informal or defective in substance. It will in any event give color of title. And these decisions are based upon the consideration that if it were necessary for the party to produce a regular deed and prove compliance with all the preliminary requisites, the statute would be simply unnecessary and futile. It would benefit him not the least: *Edgerton* v. *Bird*, 6 Wis. 527; *Hill* v. *Kricke*, Id. 442; *Sprecker* v. *Wakeley*, 11 Id. 432; *Oconto Co.* v. *Jerrard*, 46 Id. 317; *McMillan* v. *Wehle*, 55 Id. 685; *Leffingwell* v. *Warren*, 2 Black (U. S.) 599. Thus, in *Edgerton* v. *Bird*, 6 Wis. 527, Judge COLE observes: "The possession and occupation seem to have been actual, continuous and notorious under the tax deed, and as a mat-

ter of course hostile to the title of the true owner. But it was insisted upon the argument of the cause by the counsel for the plaintiff, that the tax deed is void upon its face, and therefore was no evidence of colorable title; for it is said, to constitute adverse possession, the person actually holding must claim in good faith under a title hostile to the title of the real owner; that the court must determine, by an inspection of the deed or other evidence of title, whether the claim of title was hostile or adverse; and if it appeared that the title, paper or contract was not in the nature and form of a conveyance, but showed upon its face that it was a nullity, the claim of title under such an instrument could not be adverse, the presumption being that the person holding knew whether the title paper on its face was good or not, and if it was not adequate to carry the true title, it was evidence of bad faith in the one claiming under it. Although the cases on adverse possession and the statutes of limitation are numerous in the books, it is not always easy to ascertain and determine what is meant by the phrase 'color of title.' In the case of *Wright* v. *Mattison*, 18 How. 50, the court, upon this subject, says: 'The courts have concurred, it is believed without an exception, in defining color of title to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been, whether there has been an apparent or colorable title under which an entry or claim has been made in good faith.' * * * We are of the opinion that the tax deed is sufficient to show color of title in Bird, within the doctrine of the case of *Wright* v. *Mattison*, and many other well considered cases found in the reports, without regard to its intrinsic worth as a title, or the informality in its execution."

And this view is sustained by a number of decisions from other states, constituting, perhaps, the majority in weight: *Chicago, &c., Railroad* v. *Alfree*, 64 Iowa 500; *Pugh* v. *Youngblood*, 69 Ala. 296; *Gatling* v. *Lane*, (Sup. Ct. Nebr. 1885), 19 Reporter 344; *Johnson* v. *Elwood*, 53 N. Y. 434; *Dalton* v. *Lucas*, 63 Ill. 337; *Stovall* v. *Fowler*, 72 Ala. 77.

The United States Supreme Court, in the case of *Moore* v. *Brown*, 11 How. 414, held that a tax deed void upon its face does not give such color of title as to sustain the bar of the special

statute of limitations provided for actions concerning tax titles. But WAYNE, J., who delivered the opinion of the majority of the court, said: "We do not put the conclusion upon the point exclusively upon the fact that it is a void deed, but that it is so, being a deed made in violation of law." And TANEY, C. J., and CATRON, J., dissented, on the ground that such a construction of the statute would be directly subversive of its intention, and would render it nugatory. And in a subsequent case (*Pillow* v. *Roberts*, 13 How. 472), the same court observed: "Color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and of course adversely to all the world."

IX. *Good Faith of Claimant, how far Material.*—In order to arrive at definite conclusions in regard to the effect of an instrument which discloses its own invalidity, as giving color of title, it will be necessary to take into account the good or bad faith of the claimant, and ascertain what effect that will have upon the possession. And here we shall be aided by a comparison of the doctrines of the Roman law with our own. By the Roman systems, a distinction was made between the *corpus* and the *animus* of possession; the former indicating merely the actual fact of occupation, and the latter referring to the intention (with regard to ownership) with which it was held. And prescription could not confer a complete title unless the intention of the possessor was to claim the thing as his own. This distinction is also found in the English law. For, says a distinguished writer, "this intent to claim and possess the land is one of the qualities essential to constitute a disseisin. A mere going upon the land by any one, and staying there without the intent to claim and assert the land to be his own, would not operate as an ouster. The intention guides the entry and fixes its character:" 3 Washb. Real Prop., 4th ed., 139. Again, by the principles of the civil law, "possession must be founded upon a *justus titulus;* that is, upon some occurrence or event which would produce the conviction in a person that he was the owner. The *titulus* must be *justus*, that is, an event *per se* must have occcurred sufficient to pass property. This event must also be *verus*, that is to say, the legal transaction upon which this condition is based must have been actually concluded. The possessor must, by a *justus titulus*, have the conviction of being the *dominus* (*bona fides*). This honest belief must be founded upon probable error (*error facti pro-*

habilis), and must have existed from the very commencement:" Tomkins & Jencken, Mod. Rom. Law 160. And see Mackeldey's Rom. Law, § 289; l. 11 Dig. 41–4; l. 5, § 1, Dig. 41, 10. This means, as we understand it, that the claimant's belief in his title is erroneous—else he would have no need to invoke the aid of prescription—but such belief must in fact exist, and the error must be an excusable one, an error that any prudent man might make. And there seems to be sufficient authority in our own law for stating that if the grantee *knows* that the deed conveys no title, it will not avail him as color: *Waterhouse* v. *Martin*, Peck. 392; *Saxton* v. *Hunt*, 20 N. J. L. 487; *Moody* v. *Fleming*, 4 Ga. 115. "In order that a claimant be entitled to a presumptive occupancy to the extent of the claimed boundary, he must enter and occupy under the belief that his title is good:" *Davidson* v. *Coombs* (Ct. of App. Ky.) 18 Reporter 15; *Nieto* v. *Carpenter*, 21 Cal. 455.

As the result of the authorities, we should be inclined to state the rule in this manner: A void deed, or other written instrument, will not serve as color of title if the ground of its invalidity is so apparent on its face that a person of ordinary prudence and experience could not be held excusable for failing to discover it. And this is, in effect, the conclusion reached by LUMPKIN, J., in *Beverly* v. *Burke*, 9 Ga. 443, where he says: "Color of title may be defined to be a writing, upon its face professing to pass title, but which does not do it, either from want of title in the person making it, or from the defective conveyance that is used—a title that is imperfect, but not so obviously that it would be apparent to one not skilled in the law."

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